3-0325-20939-CV

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Chuck Repke,

Complainant,

vs.

Saint Paul Better Ballot Campaign, a Project of FairVote Minnesota,

Respondent,

and

Daniel D. Dobson,

Complainant,

vs.

Saint Paul Better Ballot Campaign, a Project of FairVote Minnesota,

Respondent.

PROBABLE CAUSE ORDER

The above-entitled matter came on for a probable cause hearing as provided by Minn. Stat. § 211B.34, before Administrative Law Judge Kathleen D. Sheehy, on November 4, 2009, to consider the complaint filed with the Office of Administrative Hearings on October 30, 2009, by Chuck Repke, and the complaint filed on November 2, 2009, by Daniel D. Dobson. The parties participated by telephone conference call. The record closed upon receipt of Respondent's post-hearing submission on November 4, 2009.

Complainants Chuck Repke and Daniel D. Dobson appeared on their own behalf. Jay Benanav and Jane Prince, attorneys at law, Weinblatt & Gaylord PLC, appeared on behalf of Respondent Saint Paul Better Ballot Campaign, a Project of FairVote Minnesota.

Based upon the record and all of the proceedings in this matter, including the Memorandum incorporated herein, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED:

1. That there is probable cause to believe that Respondent violated Minnesota Statute § 211B.02 by claiming that the instant runoff voting ballot

question was endorsed by the Minnesota DFL, the League of Women Voters, President Obama, Senator McCain and Ralph Nader.

2. That this matter is referred to the Chief Administrative Law Judge for assignment to a panel of three Administrative Law Judges for hearing pursuant to Minnesota Statute § 211B.35.

Dated: November 6, 2009 s/Kathleen D. Sheehy

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KATHLEEN D. SHEEHY
Administrative Law Judge

MEMORANDUM

Respondent Saint Paul Better Ballot Campaign is a non-partisan citizen committee organized to support instant runoff voting in Saint Paul. Whether to use instant runoff voting for city elections was a question posed on the ballot in the election last week. According to the Complaints, Respondent disseminated literature that falsely claims the support or endorsement of the League of Women Voters, the Minnesota DFL, President Barack Obama, Senator John McCain, Ralph Nader and Cynthia McKinney. The Complaints allege that the League of Women Voters and the Minnesota DFL have not endorsed the St. Paul ballot question and the Complaints include position statements from the organizations that support this assertion. Complainants further allege that President Obama, Senator McCain, Ralph Nader and Cynthia McKinney have not given written permission to Respondent to claim their endorsement as required by Minn. Stat. § 211B.02.

There are two pieces of campaign literature at issue. The first is a card on which George Latimer, Former Mayor of Saint Paul, outlines the reasons to support instant runoff voting. The card states: "Please vote YES for Instant Runoff Voting on November 3." The corner on the front of the card reads: "P.S. Don't just take my word for it, turn to see the broad-based support for IRV, including the League of Women Voters." The back of the card states in large letters, "Vote Yes for Instant Runoff Voting Nov. 3." To the left of that statement are the words "Endorsed by President Barack Obama & former presidential candidate John McCain. Also by the League of Women Voters of St. Paul & Minnesota, the Minnesota DFL Party…." The second piece of literature states in large letters "Vote Yes for Instant Runoff Voting Nov. 3." On the left side the card reads: "Endorsed by President Barack Obama & presidential candidates John McCain, Cynthia McKinney & Ralph Nader…[a]lso by the Minnesota DFL Party" and the "League of Women Voters of Saint Paul and Minnesota."

Minn. Stat. § 211B.02 provides as follows:

211B.02 False Claim of Support.

> A person or candidate may not knowingly make, directly or indirectly, a false claim stating or implying that a candidate or ballot question has the support or endorsement of a major political party or party unit or of an organization. A person or candidate may not state in written campaign material that the candidate or ballot question has the support or endorsement of an individual without first getting written permission from the individual to do so.

The purpose of a probable cause determination is to determine whether, given the facts disclosed by the record, it is fair and reasonable to require the respondent to go to hearing on the merits.[1] If the judge is satisfied that the facts appearing in the record, including reliable hearsay, would preclude the granting of a motion for a directed verdict of acquittal, a motion to dismiss for lack of probable cause should be denied.[2] A judge's function at a probable cause hearing does not extend to an assessment of the relative credibility of conflicting testimony. As applied to these proceedings, a probable cause hearing is not a preview or a mini-version of a hearing on the merits; its function is simply to determine whether the facts available establish a reasonable belief that the Respondents have committed a violation. At a hearing on the merits, a panel has the benefit of a more fully developed record and the ability to make credibility determinations in evaluating whether a violation has been proved, considering the record as a whole and the applicable evidentiary burdens and standards.

Respondent has asserted numerous defenses. First, Respondent argues that as a political committee, it is not a "person" as that term is used in Minn. Stat. § 211B.02. It is true that Minn. Stat. Ch. 211B does not include any specific definition for the term "person," but in Minn. Stat. § 645.44, the Legislature defined "person" as follows:

> The following words, terms, and phrases used in Minnesota Statutes or any legislative act shall have the meanings given them in this section, unless another intention clearly appears…. Subd. 7. Person. "Person" may extend and be applied to bodies politic and corporate, and to partnerships and other unincorporated associations.

According to Minn. Stat. § 645.44, the word "person" as used in Minn. Stat. § 211B.02 should be read to include corporate or unincorporated entities. In other words, § 211B.02 should not be narrowly interpreted to apply to only "natural persons," but to apply to corporate and unincorporated entities such as political committees.[3] Moreover, "committee" is defined in Minn. Stat. § 211B.01 as "two or more persons acting together or a corporation or association acting to influence the nomination, election, or defeat of a candidate or to promote or defeat a ballot question." Because Respondent is organized as a political committee, which is defined as "two or more persons," it falls within the purview of Minn. Stat. § 211B.02, and the Complaints will not be dismissed for this reason.

Second, Respondent asserts that the Complaints should be dismissed because the Minnesota DFL, the League of Women Voters, President Obama, Senator McCain and Ralph Nader have generally endorsed the concept of instant runoff voting. While it may be true that these organizations and individuals have generally endorsed instant runoff voting, it must be ascertained at an evidentiary hearing whether Respondent has knowingly used those general statements of support for the concept of instant runoff voting to falsely state or imply endorsement of the specific ballot question at issue.

Finally, Respondent argues that because the Minnesota DFL has identified the adoption of instant runoff voting for use in state and local elections as a legislative priority, it can be said that the Minnesota DFL has endorsed instant runoff voting. It argues that the internal processes of the DFL used to obtain a formal endorsement are irrelevant, and that the DFL's support of instant runoff voting can be gleaned from public documents such as the DFL Action Agenda.[4] The Administrative Law Judge disagrees. The Minnesota Supreme Court has made clear that a candidate cannot imply a DFL endorsement when the DFL has not formally endorsed that candidate.[5] Complainants have produced evidence that neither the DFL nor the League of Women Voters has endorsed the ballot question.[6]

The Administrative Law Judge concludes that based on the record presented, the Complainants have demonstrated probable cause to believe that the Respondent violated Minn. Stat. § 211B.02. It is therefore reasonable to require the Respondent to go to hearing on the merits and to allow a panel of three Administrative Law Judges to determine whether the Respondents violated Minn. Stat. § 211B.02.

K. D. S.

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[1] *State v. Florence*, 239 N.W.2d 892, 902 (Minn. 1976).

[2] *Id*. at 903. In civil cases, a motion for a directed verdict presents a question of law regarding the sufficiency of the evidence to raise a fact question. The judge must view all the evidence presented in the light most favorable to the adverse party and resolve all issues of credibility in the adverse party's favor. *See, e.g.*, Minn. R. Civ. P. 50.01; *LeBeau v. Buchanan*, 236 N.W.2d 789, 791 (Minn. 1975); *Midland National Bank v. Perranoski*, 299 N.W.2d 404, 409 (Minn. 1980). The standard for a directed verdict in civil cases is not significantly different from the test for summary judgment. *Howie v. Thomas*, 514 N.W.2d 822 (Minn. App. 1994).

[3] *See Rebman v. District 279 United*, OAH Docket No. 8-6326-19989-CV, Dismissal Order (Oct. 28, 2008) (rejecting claim that political committee was not a "person" under Minn. Stat. § 211B.02); *McClure v. Davis Engineering, L.L.C.*, 716 N.W.2d 354, 357 (Minn. App. 2006) (a corporation could be a "commission salesperson," as those terms were used in Minn. Stat. § 181.145, because the court did not find "another clear intention in section 181.145"); *Dayton Hudson Corp. v. Johnson*, 528 N.W.2d 260, 262 (Minn. App. 1995) (the retailer "Dayton's" was "a person who is a victim of harassment" that was "entitled to seek a restraining order under the

anti-harassment statute," because use of the general definition of "person" found in Minn. Stat. § 645.44, subd. 7 did not "lead to an absurd result"); *But cf., Thomas v. Braswell*, OAH Docket No. 15-6310-19969-CV (2008) (including a city as a "person" under the anti-bribery provisions of Minn. Stat. § 211B.13 "would not promote the statute's purpose" of prohibiting "the bribing of voters") (http://www.oah.state.mn.us/aljBase/631019969.primafacie.ord.htm).

[4] *See* attachments to Respondent's Motion to Dismiss, Nov. 2, 2009.

[5] *See Schmitt v. McLaughlin*, 275 N.W.2d 587, 591 (Minn. 1979) (holding that a candidate's use of the initials "DFL" implies to the average voter that the candidate had the endorsement or support of the DFL party; candidates have a right to inform voters of their party affiliation "by use of such words as 'member of' or 'affiliated with' in conjunction with the initials 'DFL'"); *Matter of Ryan,* 303 N.W.2d 462 (Minn. 1981) (the use of the initials "DFL" without the modifying language authorized in Schmitt implied party endorsement; candidate "knowingly" violated statute "if he knew that his literature falsely claimed or implied that he had party support or endorsement"); *Daugherty v. Hilary,* 344 N.W.2d 826 (Minn. 1984) (holding candidate knowingly violated statute when he falsely implied endorsement).

[6] *See* Exs. 1-3.